IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

No. 130

NORMAN SEE, *Appellant*,

vs.

CITY OF SEATTLE, *Appellee*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE APPELLEE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 180

NORMAN SEE, *Appellant,*

against

CITY OF SEATTLE, *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE APPELLEE

Opinion Below

The opinion of the Supreme Court of Washington is contained in 67 Wn. Dec. 2, No. 9, pp. 465-576 (1966). It is set forth in full in the Record at pages 17-29.

Jurisdiction

The decision of the Supreme Court of Washington was released November 24, 1965. R. 17. A petition for Rehearing was denied January 19, 1966. R. 29. Notice of Appeal was filed August 8, 1966. R. 31. The Jurisdictional Statement of Appellant was filed May 27, 1966 and probable jurisdiction was granted October 10, 1966. R. 33. The jurisdiction of this Court rests upon 28 U.S.C. 1257 (2).

Questions Presented

Where there is an undisputed legislative finding that the safety of persons and property requires city-wide, routine, periodic inspections of all buildings (except the interior of dwellings) to eliminate preventable fires and explosions, is the entry of a warehouse for such a purpose an unreasonable search and seizure which requires a Fourth Amendment Warrant issued by a judge upon a showing of probable cause?

Whether the fact that Appellant's building is a warehouse has any significance in answering this question?

Statement

Appellant prepared a stipulation to bring before the Court the facts he deems important to his claim. Perhaps of more importance is the indisputable legislative finding by Seattle's City Council that the safety of persons and property located in that city requires periodic, routine, fire and explosion prevention inspections of all buildings except the interior of dwellings.

The Ordinance fixes minimum standards for buildings and requires city-wide inspections "for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire" (sec. 8.01.050). In its preamble the Ordinance states that inspections are essential to safeguard:

> "... life and property from the hazards of fire and explosion arising from the storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life or property in the use or occupancy of buildings or premises"

except the interior of dwellings.

This Ordinance names the specific fire and explosion hazards which it seeks to prevent and requires inspectors

to give written notice of the defects found upon inspection the elimination of which will prevent these hazards.

Unlike the regulations in *District of Columbia* v. *Little*, 339 U.S. 1; *Frank* v. *Maryland*, 359 U.S. 360; and *Eaton* v. *Price*, 364 U.S. 263, which covered health, fire and other hazards, this Ordinance is aimed strictly at named fire and explosion hazards. Unlike the regulations involved in those cases the Seattle Ordinance excepts the interior of dwellings from the periodic, routine city-wide inspections which it requires. Also, unlike those cases which involved dwellings, this case involves inspection of a warehouse presumably used for business or commercial purposes.

Appellant violated Seattle's Ordinance by refusing firemen entry to his warehouse which they sought as part of a routine, periodic city-wide inspection. He contends that a Fourth Amendment warrant issued by a judge upon evidence of probable cause is required for such an entry. Appellant also claims that such probable cause does not exist so no such warrant can issue. Thus the structural safety and combustionable or explosive contents of his warehouse must remain secret. The Trial Court and the Supreme Court of Washington both rejected Appellant's contention.

As found by the Council in enacting this Ordinance, actual experience in Seattle shows conclusively that an effective fire safety inspection program materially reduces the number of incidents of fire and the seriousness thereof when a fire does occur, thereby resulting in a lesser loss of life and property. Official experience supporting this finding is contained in Appendix A. In the year 1962, for example, notices of correction arose in approximately one of every ten inspections. See Appendix A.

Two additional benefits derive from a routine but intensive inspection program such as Seattle's. *First*, the

inspecting firemen are afforded the opportunity of educating building owners or occupants on the advantage of fire prevention programs. In addition, most owners and occupants are unaware of the minimum requirements of the ordinance and thus of the fire and explosion hazards which may exist on their premises. *Second,* in the case of larger structures or those with particularly hazardous contents, a fire fighting plan may be developed which is tailored to the particular use, available internal access, and the location and type of fire fighting equipment on the premises. It is well established that knowledge of and adequate egress for occupants and firemen, in case of a fire, is a major life saving factor and one for which the city bears a major responsibility. The ordinance specifies this. (R. 6, § 8.01. 060).

The effectiveness of Seattle's fire inspection and prevention program is evidenced by a per capita fire loss over the last eleven years of approximately one-third the national average. Even so, fire losses are on the increase. The figures are contained in Appendix A.

The legislative finding that fire safety and prevention inspections are necessary is not controverted. Nor is it disputed that such inspections protect not only the owner; his property and those who enter upon his premises (including firemen in case of fire) but the neighboring properties and persons therein and the public as a whole.

Summary of Argument

I

Finding that life and property in Seattle are endangered by substandard structure of buildings and improper storage of explosives and combustible materials, Seattle's City Council enacted an ordinance which seeks to prevent fires

and explosions by setting minimum standards for buildings and for inspections of all buildings, except interior of dwellings, to ascertain whether the standards are met. *In rem* in operation, the ordinance is aimed at defective property rather than people, providing penalties against the individual only after an owner or occupant fails to correct deficiencies set forth in writing by the inspector. It is not a crime under the ordinance to maintain a fire or explosive hazard. The maintenance of such a hazard *only* becomes a crime *after* the Fire Chief has served an order for removal or correction of such a hazard and that order is not complied with. Appellant denied an inspector entry to his warehouse under the ordinance claiming a Fourth Amendment warrant is required and that since no probable cause exists for the requested entry the structure and contents of his warehouse must remain secret. This is denied by Appellee.

II

Inspection of Appellant's warehouse as a part of a routine, periodic, city-wide fire and explosion prevention program is necessary to the performance of the City of Seattle's duty to protect life and property by eliminating preventable fires and explosions—the legislative basis for its ordinance. The Fourth Amendment's purpose is the protection of the privacy of individuals from unreasonable searches and seizures by public officials. It prohibits entry upon, or search and seizure of, property intimately connected with an individual without a Fourth Amendment warrant. A warehouse when located in a city of about 600,000, and thus becoming one of the buildings found to require routine, periodic, safety inspection, is not property so intimately associated with an individual as to make entry into the warehouse for such inspection a violation of the Fourth Amendment.

III

In view of the nature and purposes of a warehouse, it not being a building intimately connected with the life of an individual, the chances of the constitutional rights of an individual being invaded by a fire inspection are very small. The only rights involved in a warehouse establishment are private possessory rights which will be afforded protection, not jeopardized, by inspection to prevent fire and explosions.

Constitutional rights do not operate in a vacuum. Nowhere has Appellant identified any "person, house, papers or effects" or anything else he seeks to protect by claiming that the entry to his warehouse will be an "unreasonable" search and seizure under the Fourth Amendment.

IV

Actual experience demonstrates the importance of fire inspections in substantially reducing fire loss. To uphold Appellant's contention would, in effect, render his warehouse completely immune from fire inspection, and sanction the continued existence of any fire and explosion hazards therein in the midst of a heavily populated area. This is a risk Appellant may wish to take but he should not be permitted to impose the risk upon others for whose safety the city has a responsibility.

V

Application of the Fourth Amendment in the instant case may well give rise to a weakened and sophistic definition of probable cause. See Dissent in *Frank* v. *Maryland*, 359 U.S. 360, 383. Rarely will or could a meaningful showing of probable cause, as that term is understood in the criminal

context, be made. Yet the practical need for fire inspections and the actual absence of threat to individual liberties will encourage the issuance of warrants on a mere routine showing of lack of inspection for a certain period of time. Such a radical recasting of probable cause is dangerous to the real liberties the Fourth Amendment was designed to protect.

VI

Fire prevention is an essential governmental function and inspections for fire hazards are essential means of carrying out that function. The inspections entail no arrests, seizures, or imposition of criminal penalties. The Seattle Fire Code is preventative and corrective in nature and does not, as presently written and carried out, conflict with the Fourth Amendment.

VII

Frank v. *Maryland* while distinguishable from the instant case because a commercial warehouse is here involved in contrast to a dwelling, is basically sound, and should not be overruled.

ARGUMENT

I. The Seattle Fire Code Is Designed To Protect Life And Property In The City From The Elemental Danger Of Fire And Explosion And Its Operation Is Not Directed At The Individual Except To The Extent That He Refuses, After Written Notice, To Correct Or Eliminate Hazards Which Cause Fires Or Explosions.

Man lived in cities or towns for a long time before he developed effective means of preventing the fires which started in one structure from destroying the numerous structures which constituted the city. The history of the

middle ages is replete with city-wide fires. London was substantially destroyed by fire in 1666. See generally *Pepys' Diary.* New York was gutted by fire in 1835, Boston in 1872, Chicago in 1871, Baltimore in 1904, and Seattle in 1889. On June 6, 1889, a cabinet maker's glue pot boiled over on the shop's wood shavings. Within a few hours an explosive fire had set the entire Seattle business district ablaze. As a result of this fire the entire business center of the City was destroyed. See the *Post-Intelligencer,* June 7, 1889; Bagley, *History of Seattle,* (1916) pp. 419-428; and *Historic Fires of the West,* 1966, pp. 104-127.

Early in the history of this country preventative measures against city fires were taken. Thus in 1648, "Worshipful Fire Wardens" were inspecting New York dwellings to see if any mud had cracked off wooden chimneys and fireplaces. To end the indignities that these inspectors suffered from the housewives who jeeringly called them "Chimney Sweeps" the courts began to impose fines on any woman who failed to pay them proper respect. The Worshipful Fire Wardens were later replaced with "Viewers and Searchers of Hearths and Chimneys." Besides providing for inspection, early colonial law imposed a fine of fifteen shillings on "every person who shall suffer his house to be on fire." Another law directed each citizen to fill three of his leather buckets with water at sunset and place them on his door step for use in case of need. See Herbert Asbury, *Ye Olde Fire Laddies* (A. A. Knopf: 1930).

Eventually the sense of community responsibility gave rise to the volunteer fire departments. At the same time municipal ordinances were passed to reduce the possibility of uncontrolled fires by attempting to eliminate the conditions which were their cause. The Seattle Fire Code is a typical example of such an ordinance.

At issue in the instant case is the validity in the context

of the Fourth Amendment of Section 8.01.050 of the Seattle Fire Code providing for inspection of building and premises. That section provides:

> "It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards."

Immediately of note is the elimination of "the interiors of dwellings" from the provision. "Dwellings" are defined in Section 8.01.120:

> " 'Dwelling' means a building occupied exclusively for residence purposes and having not more than two (2) dwelling units or as a boarding or rooming house serving not more than fifteen (15) persons with meals or sleeping accommodations or both."

The wording of the ordinance reveals that it operates *in rem*. It does not set up a standard of conduct or proscribe activities of a person, rather, it is concerned solely with the physical conditions of innate structures and their physical (flammable, combustionable) contents which might cause fires or explosions. No mention of any person other than the Fire Chief is made in Section 8.01.050. In addition to this *in rem* operation, the section is not primarily concerned with an inspection for the purpose of prosecution for violation of the ordinance; rather, the purpose is the ascertainment of "any conditions liable to cause fire" so that they can be corrected.

The common sense preventative and correctional nature of the Seattle Fire Code is further illustrated in Section

8.01.060 dealing with Orders to Eliminate Dangerous and Hazardous Conditions. This section does not provide for the imposition of a penalty upon the citizen responsible for the hazardous condition, or for his arrest, or for the seizure of his property, but rather a remedy is set up to correct the condition. Again, the fact that the code is concerned not with regulating the activities of individuals, but rather with the conditions of innate structures and property is illustrated by the fact that the person who shall receive the order is not specified in Section 8.01.060. A specific individual feels the weight of the code only when he, through ownership or occupancy, assumes as a member of society responsibility for the structure inspected, a responsibility in return for which this owner or occupant enjoys the various rights and privileges entailed in our concept of private property.

In the pre-censorship cases, (cf. *Marcus* v. *Property Search Warrant*, 379 U.S. 717) the dangers of pre-censorship far outweigh the harm to the public, but here the dangers from entry must be laid alongside the irreparable damage in loss of life and property that can come from fire and explosion which entry might prevent. Here the ordinance is not aimed at crime. It is aimed at the saving of life and property.

A Fire Code has been in effect in Seattle from an early date and since at least 1884 it has included an inspection provision.[1]

If, as this Court suggests in *Frank* v. *Maryland*, 359 U.S. 360, 370, there is constitutional significance in "a long and consistent history of state practice," then the historical practice shows that inspections without warrant, other

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[1] Ordinance 59869 § 9-13, adopted 1930 (General Ordinances, City of Seattle 1936, p. 529-532); Ordinance 36299, approved 1916; Ordinance 17240 § 191, approved 1907 (Ordinances of the City of Seattle, 1869-1907, p. 394); Ordinance 536, division 2, § 4, approved 1884 (Ordinances of the City of Seattle, 1869-1884, p. 165).

than as a means of obtaining criminal evidence, have been an integral part of the police power of the City of Seattle since the birth of the State.

The Seattle Fire Code is a common sense attempt to deal with the elemental dangers of fire and explosion. It is concerned with correcting hazards which are caused or naturally occur through neglect, ignorance, deterioration in man-made structures and combustion of materials or unsafe storage of explosives, in order to prevent uncontrolled fires and explosions which if not prevented will destroy life and property, if not the entire city.

II. The Fourth Amendment Was Intended To Safeguard Entry To Those Buildings Which Are So Intimately Used By Individuals That The Buildings Must Be Protected From Unwarranted Governmental Intrusions In Order To Protect The Constitutional Liberties Of The Individual.

The Seattle Fire Code, in providing for periodic routine fire hazard inspections in non-dwelling structures without requiring a showing of probable cause or the obtaining of a warrant, does not violate the Fourth Amendment. That Amendment provides:

> "The right of the people to be secure in their *persons, houses, papers* and *effects*, against *unreasonable searches* and *seizures*, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." (italics supplied)

The meaning of the Fourth Amendment is apparent in its wording and in its history.

The Amendment speaks in terms of "persons, houses, papers, and effects". The term "house" is used. The purport of the wording of the Amendment is to throw a

protective wall around the dwelling house of the citizen, assuring to him privacy from governmental intrusion. The wording of the Amendment reveals the further purpose of protecting the "right of the people" in what ultimately amounts to their privacy against unwarranted intrusions by governmental authorities. It does not protect a building per se from governmental intrusion, just those buildings which are so intimately connected with the life of an individual, that in order to protect his constitutional liberties, it is necessary to throw a protective wall around the building involved. It is fair to infer that numerous buildings are not so intimately connected with an individual as to require this protection.

The history of the Amendment conclusively demonstrates the validity of this reading. The Amendment must be read against the background of the times in which it was adopted. *Entick* v. *Carrington,* 19 Howell's St. Tr. 1029 illustrates the abuses the Fourth Amendment was aimed at eliminating. That case involved an action in trespass brought by Entick, the alleged author of a seditious paper entitled *The Monitor or British Freeholder,* against four of the King's messengers in ordinary, who, armed with a general warrant signed by the Earl of Halifax, then one of King George III's principal secretarys of state, entered into Entick's house and searched it throughout, prying into and examining all the private papers, books and secret documents of Entick, and finally carting all of them away to be examined by Lord Halifax. The four messengers, in their defense, pleaded the general warrant to search and seize under which they had acted. Lord Camden, the Lord Chief Justice of the Court of Common Pleas rejected this defense:

> "... if this point should be determined in favor of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the

> search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel."

10 How. St. Tr. at 1063. See *Wilkes* v. *Wood*, 19 How. St. Tr. 1153 (1763).

While Lord Camden was writing in the context of a conflict between the government and the press, his decision reflects the presence of even more fundamental rights than those of political expression. From the times of the ancient Greeks, western man has recognized the sanctity of the home. Lord Chatham's famous speech to the effect that "the poorest man may, in his cottage, bid defiance to all the forces of the crown" recognizes this sanctity. It is obvious that a deserted cottage, or a cottage used solely for the storage of roots and potatoes would hardly enjoy this immunity from entrance, as all that would be involved would be property rights, which would not be jeopardized by a passing inspection or entrance by officers of the state. It has been said that "the spirit of the constitutional prohibition against unreasonable searches and seizures, has its source in the maxim that 'every man's house is his castle.'" Cooley, *Constitutional Law*, 300. Again, the maxim speaks of a 'house', not a factory or warehouse, which structures existed at the time the Bill of Rights was written.

In *Entick* v. *Carrington, supra* at p. 1066 Lord Camden also said:

> "The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, etc. are all of

this description; wherein every man by common consent gives up that right, for the sake of justice and the general good."

This Court has only applied the Fourth Amendment to buildings the search of which would, as a practical matter, jeopardize the constitutional liberties of an individual. In *Gouled* v. *United States*, 255 U.S. 298, a man's office was included within the purview of the Fourth Amendment; in *Taylor* v. *United States*, 286 U.S. 1, a garage immediately adjacent to a house was held within the protection, and in *Carroll* v. *United States*, 267 U.S. 132, the Court required a showing by the seizing officer that he had probable cause to believe liquor was being illegally carried in an automobile. In contrast, Mr. Justice Holmes, in *Hester* v. *United States*, 265 U.S. 57, held that open fields were not within the purview of the amendment. Mr. Justice Douglas in *Griswold* v. *Connecticut*, 381 U.S. 479, 484, recognized that essentially the Fourth Amendment along with the First and the Fifth, were designed to guarantee the privacy of the home against governmental intrusion.

In excluding dwellings from the provision of Section 8.01.050, the City of Seattle has substantially eliminated any possibility of conflict with the Fourth Amendment.

III. The Inspection Is A Reasonable Exercise Of The City's Police Powers

No facts are in the record before this Court to indicate whether the public officials were reasonable in their approach to Appellant. However, the absence of such facts does not warrant assumptions that the ordinance in question authorizes a factually unreasonable search. The rule ap-

plicable here is stated in *United States* v. *Raines* 363 U.S. 17, 21:

> "... This court as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, N.Y. & P.S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39, 28 L. ed. 899, 901, 5 S. Ct. 352."

There is no claim by Appellant that the City's fire inspectors attempted to abuse the inspection process. There is no justification for argument that the ordinance authorizes factually unreasonable inspections.

IV. The Probable Cause Criteria Of The Fourth Amendment Is Inapplicable To A Safety Inspection

The attempted entry and inspection of Appellant's warehouse here is pursuant to a duty imposed by ordinance upon the Fire Chief "to inspect * * * all buildings and premises, except the interior of dwellings, as often as may be necessary." The purpose for the enactment of such legislation and the authorization of entry to *all* commercial buildings is the proven frequency with which fire hazards exist therein and the serious consequences in the event of fire or explosions. Judicial inquiry whether on an *ex*

parte or other application to a magistrate for a "search warrant" even if authorized by state law, could not conceivably work. Whether inspections for fire hazards are programmed annually or on an area wide basis, or are concentrated in frequency because of prevailing structural conditions in the vicinity or the nature of the occupancy or storage, are matters for administrative judgment and such inquiries are not peculiarly judicial in nature. To inject the judiciary as a hurdle to safety inspections is not warranted by any proof of injury to any private or public interest or right.

The criteria for the issuance of warrants by judges as set forth in *Mapp* v. *Ohio*, 367 U.S. 643; *Marcus* v. *Property Search Warrant*, 367 U.S. 717; *Stanford* v. *Texas*, 379 U.S. 476 and the cases therein cited simply do not fit an inspection for fire and explosion prevention. There are dangers to civil liberties involved in a "watered down" criteria as suggested by the dissent in *Frank* v. *Maryland*, 359 U.S. 360 at 383.

V. The Only Individual Rights Involved In The Fire Inspection Of A Warehouse Are Property Rights Which Will Be Protected, Not Jeopardized, By The Inspection.

The instant case involves the inspection of a commercial warehouse, not a dwelling house or home or other structure or inclosure intimately used by the individual. The Fourth Amendment is intended to protect the rights of persons, it is not a blanket prohibition against an agent of a public authority entering into any structure. The chances of the political rights or the privacy of a citizen being invaded by the fire hazard inspection of a warehouse are nil. Warehouses are not used by the individual in the intimate sense that his home, office, garage or automobile are. Rather, warehouses are for the purpose of protecting innate physical objects. There is no contention,

nor even a suggestion that entry to the warehouse was denied in the instant case to protect the "person, house, papers and effects."

These rights of possession are the only individual rights involved in this case. Are those rights jeopardized by the inspections contemplated by 8.01.050? Not to the smallest degree. Fire inspectors aren't thieves. In fact, these possessory rights are enhanced by the protection afforded by a fire inspection. Warehouse fires and explosions could destroy untold lives and amounts of property, and the inspection by fire prevention experts materially reduces that risk.

VI. Where All Available Information Conclusively Demonstrates That Fire Inspections Materially Reduce Fire Loss, Appellant, Who Has Made No Showing That He Or Others Intimately Connected With His Warehouse Have Liberties Which Will Be Jeopardized By A Fire Inspection, Has A Responsibility As A Property Owner To Cooperate With The Inspectors.

Actual experience in Seattle shows conclusively that an effective fire safety inspection program materially reduces the number of incidents of fire and explosions and the seriousness thereof when a fire or explosion does occur, thereby resulting in a lesser loss of life and property. The inspecting firemen are also afforded the opportunity of educating building owners or occupants on the advantage of fire prevention programs and themselves on how to get persons out of or themselves into specific buildings in case of a fire. In case of a fire, the life of Appellant or Appellant's employees may depend upon such knowledge.

The upholding of Appellant's claim means the complete nullification of Seattle's fire prevention program as to Appellant's warehouse. Under the stipulated facts no Fourth Amendment warrant can issue. Thus no inspection can be made.

This means that Appellant's warehouse could secretly contain the "dangerous" and "hazardous" "conditions or materials" specified in Section 8.01.060 of the Ordinance and nothing can be done to protect Appellant's employees, firemen, neighbors and the public. Appellant can store secretly, in his warehouse, with complete immunity, "dangerous or unlawful amounts of combustible or explosive or otherwise hazardous materials", and despite its duty to protect property and the health, safety and welfare of all persons within its corporate limits, the City of Seattle is powerless to do anything to eliminate these dangers.

Appellant under his claimed constitutional right can secretly violate this Ordinance's provisions (§ 8.01.060, subsections 2 through 5) in his warehouse by maintaining:

> "2. Hazardous conditions arising from defective or improperly installed equipment for handling or using combustible or explosive or otherwise hazardous materials;
>
> "3. Dangerous accumulations of rubbish, waste paper, boxes, shavings or other highly flammable materials;
>
> "4. Accumulations of dust or waste material in air conditioning or ventilating systems or of grease in kitchen or other exhaust ducts;
>
> "5. Obstructions to or on fire escapes, stairs, passageways, doors or windows, liable to interfere with the operations of the Fire Department or egress of occupants in case of fire."

Appellant can secretly violate subsection 6 which provides for inspection and correction of:

> "6. Any building or other structure which, for want of repairs, lack of sufficient fire escapes or other exit facilities, automatic or other fire alarm apparatus

> or fire extinguishing equipment, or by reason of age or dilapidated condition, or from any other cause, creates a hazardous condition."

Surely, Appellant is not entitled to the convenience of a city location for his warehouse without the assumption of his share of the burdens which arise from that warehouse location. Appellant could build himself a warehouse in the middle of 1,000 rural acres and thereby create no danger to anyone by complete privacy. But the overwhelming experience proves the contrary when he locates his warehouse in a city where the dangers found by the Seattle City Council exist.

Appellant should be required to assume the responsibilities which accompany the privileges of private property in an urban community. Elementary to those responsibilities is the duty not to endanger or harm neighbors or neighboring properties. Appellant is totally ill equipped to carry out an effective program of fire prevention. He must, therefore, as a matter of individual responsibility, do everything in his power to cooperate with the municipal agents who are appointed to protect his and other's property from fire.

VII. Application Of The Fourth Amendment In The Instant Case Would Weaken The Protection Afforded By That Amendment By Giving Rise To A Weakened And Sophistic Definition Of Probable Cause.

The Bill of Rights is and must be, if it is to endure, a nontechnical document which can be read and understood by a citizen of ordinary intelligence. Mr. Justice Goldberg stated in *United States* v. *Ventresca*, 380 U.S. 102, 108, that "the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract". A

substantial weakening of the Amendment will take place if its purview is extended to areas where no citizen's liberties are involved, and the granting of a warrant becomes a mere routine.

Examination should be made into what facts will be placed before a magistrate for him to use in determining if there is probable cause to believe fire hazards are present. In the vast number of cases, the fire inspector will be able to make no showing except that the building has not been inspected for a certain length of time, and that experience, perhaps statistics, show that normal deterioration alone over this period gives rise in many instances to hazardous conditions. Upon consideration of the practical fact that no individual rights are threatened by the proposed inspection, the magistrate might well issue the warrant. Yet, this showing hardly amounts to probable cause as that requirement is understood in cases involving wilful crimes. See generally *United States* v. *Ventresca*, 380 U.S. 102; *Jones* v. *United States*, 362 U.S. 257. The wilful acts of an individual carried out in the preparation or consummation of a crime often leave a trail of discernible facts which provide the filament for the affidavits upon which the magistrate determines whether to issue a warrant. The gradual deterioriation of innate materials in a structure, or the unknown accumulation of debris within the confines of a locked warehouse provide none of these indicia of guilt.

Application of the Fourth Amendment to the present situation will have one of two unhappy results. Either fire inspections of a routine and periodic nature will cease to be carried out, or else a new standard of probable cause, a sophistic standard unconnected with the age old rights the Fourth Amendment was designed to protect, will evolve.

There is undoubtedly a tendency at the present to underestimate dangers from such elemental sources as fire largely

because society's preventative measures have been so successful. However, the danger of fire in many of our blighted cities, some predominantly built of frame and other non-fire proof materials, is not to be overlooked. Where no individual rights are involved it would be ludicrous to endanger life, limb and property with an overzealous interpretation of a simple and practical injunction.

VIII. The Seattle Fire Code Is Preventative And Corrective, Not Criminal In Nature, And It Does Not Conflict With The Fourth Amendment Either As It Is Written Or As It Is Carried Out.

There is no argument but that fire prevention is an essential governmental function under the city's police powers. It is conceded by all members of this Court participating in *District of Columbia* v. *Little,* 339 U.S. 1, *Frank* v. *Maryland,* 359 U.S. 360, and *Eaton* v. *Price,* 364 U.S. 263, that inspections to implement health codes are an appropriate method of assuring uniform compliance and such compliance is essential for the protection of the public health and safety. The same conclusion is applicable to a fire and explosion hazard ordinance.

Under Section 8.01.050 of Ordinance 80101, the Fire Chief has the duty of inspecting "all buildings and premises" except the interior of dwellings; the purpose of the inspection is for "ascertaining and causing to be corrected any condition liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards". In essence, fire safety inspections under the Ordinance are educational in nature conducted to acquaint owners and occupants of non-dwelling buildings for the purpose of eliminating, or reducing such hazards to a minimum in order to protect life and property.

The Ordinance does not authorize the Fire Chief to force

entry into a building or seize or inspect the private papers of the occupant or search for or seize evidence of crime. The Ordinance does not authorize inspections at unreasonable hours or by unreasonable means or with unreasonable frequency, even though the hours of inspection may vary with the use and the frequency with the hazard. Nor does the Ordinance authorize inspections of Appellant's place of habitation, or authorize unannounced intrusions. Arrest, forcible entry, rummaging of drawers, search of private papers and effects such as are found in a search for criminal evidence is not authorized in this exercise of the police power of the City to protect the public safety and welfare. As emphasized by the Washington Supreme Court the "inspection in the present case was only for discovering of fire hazards." R. 27. In the 590,576 routine fire inspections of commercial and industrial properties made in Seattle under the Ordinance between 1954 and 1962, 148,821 notices of violations were issued. See Appendix A.

A clear distinction exists between this type of inspection and a search for criminal evidence. The validity of this distinction is apparent when consideration is made of the consequence of the inspection. No criminal penalty is placed on the individual upon discovery of a hazardous condition. It is only upon failure to comply with the lawful remedial order of the Fire Chief issued pursuant to the Ordinance that upon conviction a person becomes punishable by a fine not to exceed ninety days, or by both such fine and imprisonment (R. 11).

To the extent that the Seattle Fire Code provides for a penalty for failure to comply with a lawful order of the Fire Chief to eliminate dangerous or hazardous conditions it is similar to the ordinance upheld by this Court in *Frank* v. *Maryland*, 359 U.S. 360.

Fire inspections, as a practical matter, have as their subject, material which, in most instances, is totally irrelevant to a criminal investigation. The purpose of the investigation is dominate in the mind of the fireman. Material which would have significance to a police officer making a cursory inspection, would have no significance to a fire inspector except in so far as it constituted a fire hazard.

Use of knowledge gained through abuse of the fire inspection process would be prohibited by the courts. *Mapp* v. *Ohio*, 367 U.S. 643, 655.

IX. The Principle Involved In Frank v. Maryland Should Not Be Overruled In This Case

While this case is distinguishable due to the commercial warehouse involved, it is submitted that the principle of law announced in *Frank* v. *Maryland*, 359 U.S. 360, and affirmed in *Eaton* v. *Price*, 364 U.S. 263 should not be overruled. Faulting the majority's statement on history of the Fourth Amendment as incomplete because it emphasizes "criminal prosecutions and forfeitures", seems erroneous, as the very next sentence of the Opinion states that the "application of the Fourth Amendment" is "not restricted within these historic bounds" 359 U.S. at 365, 366. The Dissenting Opinion's reference to possible weakening of the requirements of probable cause in issuing warrants for health and fire inspections (359 U.S. at 383) does not reveal any substantial reason against the actual decision in *Frank*. The decision is sound in principle. It has now been tested in practice for approximately seven years. During this period municipalities have pursued, and in many cases intensified, their planned safety inspection programs. The absence of planned or regular routine inspections is referred to some seven times in Mr. Justice Brennan's opinion

in *Eaton*, 364 U.S. at 268, 272. Two conclusions are clear: First, public opinion continues to sanction and in the great majority of instances has welcomed such efforts; and Second, the abuses and forms of subterfuge feared by many have failed to materialize. Nor did they exist prior to *Frank* and *Eaton*.

During this period from 1959 to 1967 five state courts have passed upon the validity of municipalities requiring inspection of buildings for health, safety and fire prevention purposes. *DePass* v. *City of Spartanburg*, 107 S.E. 2d 350 (S.C. 1959); *St. Louis* v. *Evans*, 337 S.W. 2d 948 (Mo. 1960); *Commonwealth* v. *Hadley*, 1359 Mass. Adv. Sheets 1966; *Camara* v. *Municipal Court*, 237 Adv. Cal. App. 136, 46 Cal. Reptr. 585 (1965); and the instant case, *See* v. *City of Seattle*. Each of the state courts reviewed the questions presented by Appellant here and each upheld the municipalities power and duty to inspect. Thus aside from *District of Columbia* v. *Little*, 178 F. 2d 13 (D.C.Cir. 1949), affirmed on other grounds 339 U.S. 1, in which a dwelling, not a warehouse, was involved, more than 100 years of city inspections for health and safety purposes have found no appellate court upholding Appellant's contentions. This national record in itself indicates that inspectors have not abused inspections for safety and explosion purposes.

Recent pronouncements in other First or Fourth Amendment or Due Process cases do not require that the Rule of the *Frank* case be overruled. *Mapp* v. *Ohio*, 367 U.S. 643; *Marcus* v. *Property Search Warrant*, 367 U.S. 717; and *Stanford* v. *Texas*, 379 U.S. 476 are classic examples for applicability of the Fourth Amendment and so obviously distinguishable on their facts as not to require consideration here despite Appellant's reliance upon them in urging the overruling of *Frank* or *Eaton*.

Conclusion

For the reasons set forth herein it is submitted that the Judgment in this case should be affirmed.

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APPENDIX A

Per Capita Fire Loss

From Annual Reports of Seattle Fire Department for Years Indicated
[These reports are printed public records of the City of Seattle]

Year	Seattle Loss	National Loss
1954	$1.86	$5.42
1955	1.34	5.45
1956	2.19	5.60
1957	1.24	5.96
1958	4.32	6.07
1959	1.03	6.12
1960	.83	6.14
1961	1.93	6.72
1962	2.26	7.09
1963	3.40	7.36
1964	3.13	7.07
1965	4.12	7.07
Totals:	$27.65	$76.07

Routine Fire Inspections

Year	Inspections Commercial & Industrial	Notices
1954	41,604	24,312
1955	41,498	23,290
1956	31,821	25,305
1957	21,961	19,402
1958	41,057	10,052
1959	71,626	11,031
1960	87,098	12,923
1961	121,940*	9,541
1962	131,971*	12,965
1963	88,297	N/A**
1964	63,516	N/A
1965	85,220	N/A

* Includes night inspections of high life hazard occupancies (hotels, hospitals, nursing homes, etc.) and reinspections.

** Not Available because new Fire Chief did not compile and publish in the Annual Reports for these years.